

THE FREEDOM OF INFORMATION ACT

A User's Guide

By The Freedom of Information Clearinghouse
A Project of Ralph Nader
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The Freedom of Information Act ("FOIA") was enacted by Congress in 1966 to give the public access to information held by the federal government. The Act gives any person the right to request and receive access to any document, file, or other record in the possession of any agency of the federal government, subject to exemptions. The Act does not require the government to create documents in response to your request, but simply to provide documents that already exist. Although the federal Act does not apply to state governments, each state has its own laws governing disclosure of records held by state and local government bodies.

The federal and state governments are vast storehouses of untapped information. Public access to this information is important for several reasons. First, such information is necessary to inform the public about what the government is or is not doing with regard to matters of public concern. Second, government records often contain facts that can be helpful to organizations, businesses, and individual citizens. Regulatory agencies, for instance, have a large amount of data such as inspection reports, tests on goods and services, and data on subjects such as pollution and nuclear safety.

The Freedom of Information Clearinghouse is a project of Public Citizen and Ralph Nader's Center for Study of Responsive Law. We provide technical and legal assistance to individuals, public interest groups, and the media who seek access to information held by government agencies. We are available to consult by phone or mail. The Clearinghouse also assists in litigating a select number of cases each year to protect the public's right to access government information.

The Clearinghouse is a nonprofit organization and welcomes your tax deductible contributions. This brochure provides a general description of the federal FOIA and specific guidelines on how to use it effectively.

**FREEDOM OF INFORMATION
CLEARINGHOUSE
P.O. BOX 19367
WASHINGTON, D.C. 20036
(202) 588-7783
www.citizen.org/litigation/free_info**

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HOW TO MAKE A REQUEST

(1) The first step is to determine which agency has the records you want. There is no central government FOIA office, and each agency has its own office or public information staff. There is no special way of determining which agency has the information other than common sense and contacting various agencies. If you have trouble determining which federal agencies have the records you seek, you may consult the United States Government Manual, which is available at most public libraries and on the Internet. The Government Manual contains a list of federal agencies and a brief description of their functions. The Manual also contains the addresses and telephone numbers for each agency.

(2) The next step is to determine whether a FOIA request is necessary. In 1996, Congress amended the FOIA to make it possible to obtain information that is frequently requested by the public, without a FOIA request. Agencies must make these materials, and indexes for finding them, available in their Reading Rooms. The FOIA further requires agencies to make their Reading Room materials available on-line, or on CD-ROM or disk, if they were created after November 1, 1996. Check on-line to see if the agency has posted records that provide the information you want, or indexes that will help you to identify the information systems that are likely to contain the information you want. If the agency has not posted its indexes on-line (or you do not have Internet access), check to see if the agency Reading Room has a list of information and record locator systems. Check these indexes to see if the records you seek, or related records, have been requested previously and are available at the agency's Reading Room. You may want to call the agency's public information staff for assistance, especially if you do not have access to its Reading Room materials. The public information staff should be able to provide you with a guide and reference materials on how to obtain information from the agency.

(3) If your preliminary exploration does not yield the information you seek, you may then decide to send a FOIA request asking that the agency search its files for the information and make the records available to you. Send your request to all agencies or agency field offices that may have the

information you seek. Each agency is required to produce a “handbook” that describes how to file a FOIA request for its records and describes the types of records the agency holds. You may call the agency and ask for a copy of the handbook to help you in writing your request, or you may find the handbook on the agency’s website. The *Code of Federal Regulations*, which can be found in many public libraries and on-line, also contains FOIA procedures for each agency. Some agencies accept FOIA requests by fax or by e-mail. All agencies accept requests by mail.

In your request letter, you must specify what you want, since the law requires your request to “reasonably describe” the records you seek. This means that you may not simply ask questions but must request records describing or pertaining to a particular subject. You do not need to specify a document by name or title, but you must provide a reasonable enough description to allow government employees who are familiar with the agency’s files to locate the records you seek. For example, if you want information on nursing homes in your area and know that the government requires some sort of annual surveys to be conducted on nursing homes, it is sufficient to request access to the surveys and all records pertaining to the surveys for particular years and/or regions. Agencies are not obligated to create a record to respond to your request, but only to provide existing records. A record is information in any format, including maps, photographs, computer disks, and electronic formats.

(4) Your request should state that it is being made pursuant to the Freedom of Information Act (5 U.S.C. § 552) and, if you are requesting records about yourself, pursuant to the Privacy Act (5 U.S.C. § 552a) as well. For requests to the FBI, send your letter to the FBI Field Office that you believe has your records. For all requests, you should write “Freedom of Information Request” (or Appeal) on the envelope and on the letter, and you should retain a copy for your files. You do not have to explain the reasons for your request, and government employees generally do not have any right to ask unless you are seeking a waiver of costs (see below).

(5) To request records about yourself, you may ask for “all records pertaining to me” and include your full name, address, date and place of birth, and social security number. To verify that you are requesting your own records, you may have your signature notarized by a notary public or add to the

letter the following: “Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.”

(6) If the agency maintains the records you seek in electronic form, you can request that the information be provided in that form. Also, the agency is required to undertake a “reasonable” electronic search for records it maintains in electronic format. If the agency maintains the records in one format but you want them in another, the agency must provide the information in the format you desire, if it is “readily reproducible” in that format. You should be aware that each agency’s ability to reproduce information in specified electronic formats varies.

COSTS

The Act provides that agencies may charge different fees depending on who is requesting the information. Commercial users pay reasonable standard charges for document search, review, and duplication. Educational or noncommercial scientific institutions and representatives of the news media may only be charged for reasonable duplication costs. \$.10-\$.25 per page is reasonable. All other users may be charged for document search and duplication; except for commercial users, however, the first two hours of search time and the first hundred pages of copying are free.

Regardless of the above categories, you may be entitled to a waiver or reduction of fees if, according to the Act, “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” In requesting a fee waiver, you should explain why you are seeking the information and how your access to it will further public understanding or awareness of government activities.

If you are denied a fee waiver or if an agency grants an unsatisfactory reduction of fees, ask the agency to justify its actions. Fee issues may be appealed and are also subject to judicial review.

THE AGENCY RESPONSE

Under the FOIA, an agency may deny your request if you have failed to reasonably describe the documents, if the agency has conducted a reasonable search and has determined that the requested documents do not exist or are not in the possession or control of the agency, if you are not willing to pay the anticipated costs of responding to your request, or if the documents are specifically covered by one of the Act's nine exemptions (see below). If the agency claims you have inadequately described the documents you seek, you should rewrite your request more precisely and resubmit it and/or contact the official processing your request to describe what you seek.

The law sets specific deadlines for replying to FOIA requests: 20 working days on the initial request, and 20 working days on the administrative appeal. The FOIA also requires agencies to expedite requests that are particularly time-urgent: if there is a threat to an individual's life or safety, or the party requesting the information demonstrates an urgent need to inform the public.

In spite of these rules, delay is common. Even though the law says that an agency may receive a time extension only in unusual or exceptional circumstances, agencies regularly exceed the twenty working-day deadline without notifying the requester. At some agencies, the delays may last many months or even years.

In an effort to speed up the process, Congress amended the FOIA in 1996 to encourage agencies to set up a multi-track system so that requests for smaller amounts of material can be responded to more quickly. Check agency regulations to see if your request can qualify for faster processing under a multi-track system or, in unusual circumstances, under the provision for expedited processing. In your request letter, include any information supporting your request for faster processing. If you are seeking expedited processing, you must provide the information in a statement certified to be true and correct to the best of your knowledge and belief. You can do this by including the following sentence in your letter: "I certify that the statements contained in this letter are true and correct to the best of my knowledge and belief."

If the agency does not respond in the time required, seems to be taking too long, or has denied your request or given you information you consider incomplete, you should consider the reasons for denial and the options you have for contesting them, discussed below: appealing within the agency and/or going to court.

THE NINE EXEMPTIONS

An agency may withhold some or all of the records that you seek if they fall within one or more of the nine exemptions described below. You may challenge an agency's decision to withhold the records by appealing any denial. In some cases, you may also ask the agency to use its discretion to release the records even if the records are covered by an exemption.

(1) National Security

The documents exempt under this section are those that are properly classified pursuant to a Presidential Executive Order. If you are requesting a document that the agency tells you is classified, you may want to ask that the reasons for classification be re-examined, as the agency may determine that there is no longer a need for secrecy, at least as to some parts of the records in question.

(2) Internal Agency Rules

This exemption protects rules and practices of agency personnel that are "predominantly internal" in nature and whose disclosure serves no substantial public interest or significantly risks circumvention of agency regulations or statutes. Thus, minor employee matters such as employee parking and cafeteria regulations are exempt.

(3) Information Exempted by Another Federal Statute

This exemption honors mandatory nondisclosure provisions in other laws.

(4) Trade Secrets

Agencies withhold trade secrets and confidential commercial or financial information. This exemption is often invoked by the Environmental Protection Agency, the Food and Drug Administration, and other regulatory agencies that receive information from companies. Trade secrets are protected from disclosure. Commercial or financial information may be withheld if it is not customarily disclosed to the public by the company, if its disclosure would be likely to impair the agency's ability to obtain information in the future, or if disclosure of the information would

cause substantial competitive injury to the business that submitted it to the government. Confidential or financial information that companies give to the government voluntarily ordinarily receives more protection than information that businesses are required to submit.

(5) Internal Agency Memoranda

This exemption protects information about an agency's decision-making process. Advice and recommendations involving a "deliberative process" on legal and policy matters may be withheld, but the segregable, factual portions of documents should be disclosed. Preliminary drafts and unfinished reports may be withheld, but final decisions and the memos on which they are based must generally be disclosed. Thus, a memo from a staff person to a supervisor recommending that a particular policy be established would be exempt from disclosure. But the factual portions of this memo would not be exempt unless they reveal the deliberative decision-making process of the agency.

(6) Personal Privacy

This exemption involves a balancing of the public's interest in disclosure against the degree of invasion of privacy that would result from disclosure. If your request involves this exemption, you should provide a brief explanation of the public benefits from disclosure, particularly how disclosure sheds light on government activities, so that it can be determined whether any invasion of privacy resulting from disclosure would be "clearly unwarranted."

(7) Investigatory Records

This exemption protects information compiled for law enforcement purposes that could reasonably be expected to interfere with enforcement proceedings, to identify a confidential source, to disclose techniques and procedures for law enforcement investigations, or to invade personal privacy.

(8) & (9) Other Exemptions

These are two special-interest exemptions relating to banking and oil well information, and they

are not relevant to most FOIA requests.

Note: If an agency withholds records based on one of these nine exemptions, it must (1) release portions of the records that are not exempt and that can be separated from the exempt portions; (2) indicate where the withheld portions appear on the records; and (3) if the records are withheld in their entirety, provide a reasonable estimate of the amount of information that is being withheld, unless giving an estimate would harm an interest protected by the exemption invoked. Under certain circumstances, an agency may state that it has no records subject to your request, even though it does in fact have some relevant records. For example, under exemption 1 (national security), the government can refuse to acknowledge the existence of classified records if the mere existence of the records is classified. Under exemption 7 (investigatory records), where a subject is not aware of a criminal investigation and disclosure could interfere with law enforcement proceedings, the government can refuse to state whether such records exist.

HOW TO MAKE AN APPEAL

If your request is partially or entirely denied, you may appeal within the agency or department. The agency's denial letter should inform you of appeal procedures and the proper address to send your appeal letter. Your appeal letter should attach and describe copies of the request and the denial, state that an appeal is being made of the agency's initial denial, and, if you can, explain why the denial was unwarranted, either because the exemption does not apply or because the agency should use its discretion to release the records anyway.

Many agencies require that appeals be filed within 30 days. Unless you are aware of a different time limit, you should file your appeal letter within 30 days. You must file an appeal within the agency before proceeding to court, except when an agency fails to respond substantively to your request within 20 working days. In those situations, you are legally entitled to go to court without filing an appeal. However, most courts view this as unreasonable. If your request has been excessively delayed, it is generally better to send a letter demanding a prompt response before going to court; if the request has been denied in part or in full, then you *must* appeal before a lawsuit can be filed. A lawsuit may take a year or more, so coaxing the information out of the agency is preferable to going to court. Following up written requests with phone calls can speed up your request. If agencies are aware that you know your rights, they will sometimes move more quickly. For your files, keep a written record of all phone contact with the agency processing your request.

GOING TO COURT

The Act is designed to make litigation as simple as possible. In some instances, taking a FOIA case to court is not overly complicated, and requesters can do it themselves without a lawyer. However, it is more helpful to have a lawyer if you litigate in court. After your appeal is denied, or after 20 working days have elapsed from the time the agency received your appeal, you may sue in the United States District Court where you live, where the documents are located, or in the District of Columbia. If the government cannot prove that the requested documents fall within one of nine exemptions from the Act's mandatory disclosure requirement, then the Court will order the agency to give the documents to you. Even if you lose, the agency may release more documents along the way. If you win, the Court may require the government to pay any attorney's fees that you incurred.

THE PRIVACY ACT

In 1974 Congress enacted the federal Privacy Act, 5 U.S.C. § 552a, which, on the one hand, requires the government to protect personal information from misuse and unauthorized disclosure, and, on the other hand, establishes a right for individuals to examine their own files and to seek correction of those files. The limitations on an individual's right of access under the Privacy Act are fewer than those in the FOIA. However, law enforcement agencies and the CIA are completely exempt from the individual access provisions, there is no specific time limit for an agency's initial response to a request, and only U.S. citizens or permanent resident aliens may obtain access to records. Requests for your own file should invoke both the FOIA and the Privacy Act. Neither the Privacy Act nor the FOIA can be used to deny access under the other statute.

SAMPLE REQUEST LETTER

Date

Freedom of Information Unit
(Name and Address of Government Agency)

Dear Sir or Madam:

Re: Freedom of Information Request

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, [and/or the Privacy Act, 5 U.S.C. § 552a,] I hereby request access to (or a copy of) all records pertaining to (describe the subject or document containing the information you want).

I am requesting these records (as a representative the news media, for non-commercial personal use, an educational institution, etc.).

[If any expenses in excess of \$_____ are incurred in connection with this request, please obtain my approval before any such charges are incurred.]

[I request a waiver of fees because my interest in records is not primarily commercial, and disclosure of the information will contribute significantly to public understanding of the operations or activities of the government because _____.]

I will expect a response within 20 working days as provided by law. If my request is denied in whole or in I expect a detailed justification for withholding records. I also request any segregable portions that not exempt to be disclosed.

Thank you for your prompt attention to this matter.

Very truly yours,